



November 29, 2012

Pat Bermudez
Office of General Counsel
State Bar of California
180 Howard Street
San Francisco, CA 94105

re: Proposed Amendments to the Bar's Open Meeting Rules

Dear Ms. Bermudez:

The Center for Public Interest Law (CPIL) respectfully submits the following comments on the proposed amendments to the Bar's open meeting rules issued by the Board Operations Committee on October 13, 2012 and November 16, 2012. Although the intent of these amendments is to better conform the Bar's open meeting rules to the requirements of the Bagley-Keene Open Meeting Act, Government Code section 11120 *et seq.*, that is not what the law requires of the Bar. Specifically, Business and Professions Code section 6026.7 (as added by SB 163 (Evans) of 2011, effective January 1, 2012) requires the Board of Trustees to "ensure that its open meeting requirements, as described in Section 6026.5, are consistent with, and conform to, the Bagley-Keene Open Meeting Act."

The language of this provision is clear and unambiguous. The Board of Trustees is to ensure that its open meeting requirements "are consistent with, and conform to, the Bagley-Keene Open Meeting Act." The statute does not say that the Board shall amend its open meeting rules to make them "substantially" the same as Bagley-Keene, or "relatively similar" to Bagley-Keene, or "you may pick and choose 'some' or 'selected' provisions of Bagley-Keene which you do not oppose."¹ It expressly requires the Board to ensure that its open meeting regulations "are consistent with, and conform to" the Bagley-Keene which governs all other California occupational licensing boards.

Moreover, the Board's failure to conform its open meeting rules to Bagley-Keene in the manner required by the Legislature casts an unnecessary shadow over the legal finality of Board decisions. Decisions that are rendered by the Bar may be overturned if rendered in violation of the Act (Government Code section 11130.3). Worse, the Act imposes criminal (misdemeanor) sanctions for members who attend meeting in violation of the Act, with an intent to deny the public access to

¹ Indeed, in its 2011 rulemaking proceeding to amend its open meeting rules, the Bar expressly conceded that it was adding "some" or "selected" Bagley-Keene provisions to its open meeting rules. Obviously, SB 163's addition of section 6026.7 changed the law and the Board's mandate as of January 1, 2012.

an otherwise public proceeding (Government Code section 11130.7). And the Bar itself may be liable for attorneys' fees if a lawsuit were brought that successfully vindicates the Act as against Bar decisions or practices (Government Code section 11130.5). Respectfully, it is simply unwise to risk the finality of Bar decisionmaking, attorneys' fees, and even perhaps criminal sanction simply so the Bar can continue departing from what has for years worked and been routine at every other licensing board.

As described below, some of these proposed amendments laudably and properly move the Bar somewhat closer to conformance with Bagley-Keene. However, others are inconsistent with the requirements of Bagley-Keene; and — once again, as with the Bar's 2011 rulemaking to amend its open meeting rules — the proposed amendments omit to incorporate (as is now clearly required by section 6026.7) several important Bagley-Keene transparency measures, causing the effort to fall far short of what is fairly and unobjectionably required to ensure meaningful public participation in State Bar proceedings.

CPIL is a nonprofit, nonpartisan academic and advocacy center based at the University of San Diego School of Law. Since 1980, CPIL has examined and critiqued California's regulatory agencies, including the State Bar of California. We have attended the Bar's meetings and followed its activities for 30 years. From 1987 to 1992, I served as the State Bar Discipline Monitor (under now-repealed Business and Professions Code section 6086.9), under appointment by then-Attorney General John Van de Kamp, with CPIL serving as the Monitor's staff. The State Bar Discipline Monitor position was created by the Legislature and — over the course of almost five years — we wrote eleven reports on the operation of the State Bar's discipline system. We worked with Senator Robert Presley and a succession of State Bar Presidents to fashion some 40 reforms of the system, including the passage of Senate Bill 1498 (Presley), 1988 legislation creating the current independent State Bar Court. We participated actively in the proceedings and deliberations of the 2010 Governance in the Public Interest Task Force, whose work culminated in the Legislature's passage of SB 163 (Evans) (Chapter 417, Statutes of 2011). We are well aware that the Bar is part of the judicial branch under the aegis of the California Supreme Court. And we are similarly familiar with all of the executive branch agencies that license and regulate other professions and trades in California.

Additionally, CPIL has a long history with the subject of this proposed rulemaking. In 1985, CPIL sponsored AB 1971 (Harris), which — as amended July 1, 1985 — would have imposed numerous provisions of the Bagley-Keene Open Meeting Act on the then-Board of Governors and its committees. The Bagley-Keene Act applies to every other occupational licensing board in the state, including all of the boards in the Department of Consumer Affairs. In exchange for our agreement to drop the bill, the Bar promised to adopt open meetings rules very similar to those in Bagley-Keene; thus far, the Bar has reneged on that promise. These proposed amendments move the Bar closer to compliance with Bagley-Keene in some respects, but they do not comply with section 6026.7's requirement that the Bar's open meeting rules "are consistent with, and conform to, the Bagley-Keene Open Meeting Act" and they do not ensure minimal, meaningful participation of the public in the important work of the State Bar.

Following is a detailed discussion of the Bar's new proposals.

Elimination of the Use of Secret Ballot to Elect Board Officers. The Bar proposes to amend Rule 6.54 to eliminate, beginning in 2014, the use of a secret ballot to elect Board of Trustees officers. This proposal is consistent with the Department of Consumer Affairs' longstanding interpretation of the Bagley-Keene Act,² and with several Attorney General's Opinions interpreting both the Bagley-Keene Act and the Ralph M. Brown Act, the state's open meeting act for local government bodies.³

CPIL has no objection to the proposed amendment to Rule 6.54, except to question its effective date of 2014. The Bar could easily (and should, considering the mandate in section 6026.7) begin compliance with this amendment during its July 2013 Board officer elections.

CPIL also wishes to add a caveat. We have occasionally heard the Bar's Office of General Counsel opine that the Board may elect its officers in closed session, citing *Edgar v. Oakland Museum Advisory Commission*, 36 Cal. App. 3d 73 (1973), which interpreted the "personnel matters" exemption to the Brown Act's open meeting requirement to permit a local government body to "appoint" or "elect" its officers in closed session. The Bar's position is incorrect inasmuch as the Legislature, in 1975, amended the Brown Act's "personnel matters" exception to the open meeting requirement (Government Code section 54957) to clarify that it applies solely to "the appointment, employment, or dismissal of a public employee," not the election or selection of board officers. A 1976 Attorney General's Opinion (59 Ops. Cal. Atty. Gen. 619) commented on the significance of the 1975 amendments to Government Code section 54957 as follows: "The apparent intent of the amendment was to generally restrict the use of executive sessions for the purpose of making appointments to those instances in which appointments to employee positions are under consideration. Where meetings are held to consider appointments to nonemployee positions, the Brown Act with certain exceptions now requires such appointments to be made at a public meeting. See generally 59 Ops. Cal. Atty. Gen. 266 (1976)." The Bagley-Keene Act's "personnel matters" exemption to the open meeting requirement (Government Code section 11126(a)(1)) is similarly restricted to discussions concerning "public employees." Thus, the Board is not permitted to elect its officers either by way of a secret ballot or in a closed session; it must — like all other boards subject to Bagley-Keene — elect them in an open session.

Elimination of Board Committee Closed Sessions to Receive "Advice of Counsel" on Any Issue. Business and Professions Code section 6026.5(a) allows the Board of Trustees to convene in closed session to consult with counsel concerning "pending or prospective litigation." This is similar to Bagley-Keene's "pending litigation" exception to the open meeting requirement in Government Code section 11126(e)(1).

² See, e.g., Department of Consumer Affairs, *Guide to the Bagley-Keene Open Meeting Act* (January 1, 2012) (hereinafter *DCA Guide*) at 20 ("[a]n agency may not vote by secret ballot in a public meeting nor vote in closed session on any matter where discussion, deliberation, or action taken is required to be in an open meeting. For example, the election of board officers may not be conducted by secret ballot or in closed session") (emphasis added).

³ See, e.g., 68 Ops. Cal. Atty. Gen. 65, 69 (1985) (Bagley-Keene Act prohibits members of a state commission from electing its officers by use of a secret ballot or a mail ballot); 59 Ops. Cal. Atty. Gen. 619 (1976) (Brown Act prohibits a city council from making appointments to a subsidiary body by means of a secret ballot); 59 Ops. Cal. Atty. Gen. 266 (1976) (the Brown Act's so-called "personnel matters" exception to the open meeting requirement, as amended in 1975, does not permit a local government body to elect its officers in closed session).

However, the Bar’s existing open meeting rules — specifically Rule 6.55(A)(1)— expand that closed session “authority” to Board committees, and further expand it to allow Board committees to meet in closed session to receive advice of counsel on any subject whatsoever. This is clearly beyond the purpose of the statutory exemption, which is to preserve the attorney-client privilege when the agency is involved in pending or imminent litigation. The Bar now proposes to amend Rule 6.55(A)(1) to eliminate committee closed sessions to “receive advice of counsel” and instead would permit a committee to meet in closed session to consider a matter “which would constitute an unwarranted invasion of the privacy of an individual, or other information deemed confidential under the law.” Although the Bar provides no explanation or reason for the addition of this new closed session authority for committees, it is somewhat consistent with a similar provision in Bagley-Keene at Government Code section 11126(c)(2). Inasmuch as the Bar’s expansion of the “advice of counsel” closed session authority to Board committees on any matter whatsoever is arguably *ultra vires* of the statute, CPIL does not oppose this change to Rule 6.55(A)(1).

Attendance and Participation by Non-Committee Members at Board Committee Closed Sessions. The Bar’s existing rules permit a Board of Trustees member who is not a member of a committee to attend and participate in that committee’s meetings, including committee closed sessions. Nothing in the Bar’s rules prohibits the entire Board of Trustees from attending and participating in a committee closed session — thereby rendering the subsequent Board open meeting “discussion and deliberation” a charade, because the decision has already been made in closed session. To address this situation, the Bar proposes to add a new subsection (C) to Rule 6.55, which would prohibit a quorum of the Board from attending a committee closed session to discuss three specified matters (to consider matters which could constitute an unwarranted invasion of the privacy of an individual, or other information deemed confidential under the law; to confer with a State Bar representative during negotiations with union and non-union employees; and to confer with a State Bar representative before the purchase, sale, exchange, or lease of real property). However, the Bar’s proposed amendment does not prohibit non-committee members from participating in committee discussions. In fact, Rule 6.50(F) expressly allows trustees who are not members of a committee to “attend and participate in a committee meeting.”

This proposal is completely inconsistent with the Bagley-Keene Act and — as such — is not permitted under section 6026.7 of the Business and Professions Code. First, Bagley-Keene does not permit non-committee members to attend a committee closed session at all. Bagley-Keene addresses only the attendance and participation of non-committee members at “an open and noticed meeting of a standing committee.” Government Code section 11122.5(c)(6). Further, “[i]f a majority of members of the full board are present at a committee meeting, members who are not members of the committee that is meeting may attend only as observers.”⁴ Non-committee members attending such a meeting may not participate in the committee discussion, ask questions during the discussion, vote on committee agenda items, or even sit at the dais with committee members. Government Code section 11122.5(c)(6); 81 Ops. Cal. Atty. Gen. 156. Obviously, the Bar’s approach is completely at odds with Bagley-Keene in many respects, and CPIL opposes this proposal.

Joint Sessions of the Board and Board Committees. The Bar proposes to add new subsection 6.51(A)(4) to permit the Board to call joint sessions of the Board and Board committees.

⁴ *DCA Guide*, *supra* note 2, at 3.

No explanation is provided for this proposed change. It is not limited to open sessions and may be interpreted to extend to closed sessions. As such, it may be used to circumvent the proposed limitations on non-committee member attendance and participation at committee closed sessions (described above). Nothing in the Bagley-Keene Act allows boards subject to it to convene joint board/committee meetings.⁵ As such, CPIL opposes this proposed section.

Other Inconsistencies With The Bagley-Keene Act. As noted throughout these comments, the Board of Trustees is under a statutory directive to “ensure that its open meeting requirements, as described in Section 6026.5, are consistent with, and conform to, the Bagley-Keene Act.” The proposed amendments omit entirely or are inconsistent with numerous important Bagley-Keene transparency measures. Below, CPIL discusses some of the most important omissions and inconsistencies:

1. Immediate Public Access to Meeting Materials Distributed to Board/Committee Members In Advance of a Public Meeting: Government Code section 11125.1 ensures that materials distributed to board or committee members in advance of a public meeting that pertain to discussion of an open-session agenda item are not only public records but “shall be made available upon request without delay” (section 11125.1(a)) and “shall be made available for public inspection at the meeting if prepared by the state body or a member of the state body, or after the meeting if prepared by some other person” (section 11125.1(b)). Although Rule 6.56 classifies these meeting materials as “public records,” it does not specify that a member of the public is entitled to them “without delay” and “at the meeting” so that the individual can access them at the time he/she most needs them — during the discussion at the meeting.

2. Location of Members Participating in Teleconference Meetings: Government Code section 11123 sets forth the requirements for a lawful meeting by “teleconference,” which means “a meeting of a state body, the members of which are at different locations, connected by electronic means, through either audio or both audio and video.” Under section 11123, each “location” where members of the public may attend a teleconference must be noticed on the agenda and open to the public, and at least one member of the board must be present at each of the noticed “locations.” In the words of the Department of Consumer Affairs, “the members of the agency must attend the meeting at a public location. Members are no longer able to attend the meeting via teleconference from their offices, homes, or other convenient location unless those locations are identified in the notice and agenda, and the public is permitted to attend at those locations.”⁶

The provisions of the Bar’s open meeting rules pertaining to teleconferences — specifically Rule 6.51(A)(2) and Rule 6.54(C) — do not require board or committee members to participate from a noticed location that is open to the public. While arguably more convenient for members, this loophole could allow a board member to participate in a public meeting and cast official votes while

⁵ “There are two basic types of meetings held by agencies in the Department of Consumer Affairs. The first type is a board meeting, where a quorum of the members of the board is present. The second type is a committee meeting consisting of less than a quorum of the members of the full board.” *Id.* at 3.

⁶ *Id.* at 19.

simultaneously being lobbied or influenced by a third party who is invisible to the rest of the meeting participants. This loophole — which is unfair to members of the public and to other members of the board or committee — prompted the Legislature to tighten section 11123 in 2001 (AB 192), and the Bar should close that loophole in its open meeting rules as well.

3. Participation of Non-Committee Members in Committee Discussions: As described above, the Bagley-Keene Act allows members of a board to attend an “open and noticed” meeting of a board committee so long as, if a majority of the board is present at the committee meeting, the non-committee members attend as observers only; non-committee members of the board may not participate in the committee meeting by making statements or asking questions (section 11122.5(c)(6)). Further, the Attorney General’s Office has opined that, under such circumstances, non-committee members may not sit with committee members on the dais (81 Ops. Cal. Atty. Gen. 156). This rule is intended to prevent boards from posting notice of committee meetings (which committees are usually advisory to the board) and also full board meetings at which the board will purportedly act on committee recommendations — and then accomplishing all of its business during “packed” committee meetings so as to render the full board meeting a charade. Members of the public who attend only the full board meeting have thus missed the opportunity to meaningfully participate in the board’s decisions (which were effectively accomplished at the committee meetings). Even as proposed to be amended here, the Bar’s Rules 6.50(F), 6.51(A)(3), and 6.54(A)(2) continue to permit non-committee members to attend and participate in committee meetings, which is inconsistent with the Bagley-Keene Act, the Attorney General’s Opinion, and the right of members of the public to participate in public meetings concerning government business.

4. Late Addition of Agenda Items on Regular Meeting Agendas: The Bagley-Keene Act requires the posting of an agenda 10 days in advance of a meeting of a state body; no additional items may be added to that agenda after its publication. If a state body wishes to discuss an additional item at its scheduled meeting, the body must publish notice of a “special meeting” and the item must fall into one of several enumerated categories; additionally, the state body must comply with specified notice requirements and must make a finding at the special meeting, by a two-thirds vote, “that the delay necessitated by providing notice 10 days prior to a meeting as required by Section 11125 would cause a substantial hardship on the body or that immediate action is required to protect the public interest” (section 11125.4). During its 2011 rulemaking, the Bar added new sections authorizing “special meetings” and “emergency meetings,” and these are quite similar to Bagley-Keene. However, Rule 6.51(B) is inconsistent with Bagley-Keene in that it allows the Bar to continue to add new items of all types, regardless of subject matter, to a posted agenda up until 48 hours prior to the meeting. This is inconsistent with Bagley-Keene and unfair — both to Board members and to members of the public who wish to monitor the Bar’s actions and be heard on agenda items.

5. Grounds for Closed Sessions: In Government Code section 11126, the Bagley-Keene Act sets forth with great precision the enumerated types of topics that may be discussed by a board or committee behind closed doors. These exemptions to the state’s open meeting law have been interpreted for decades by courts and by the Attorney General’s Office, and their parameters are well-known to other occupational licensing boards and the attorneys who advise them. In crafting these exemptions, the Legislature has been careful not to allow the “closed session” exemption to swallow the open meeting requirement. For example, the “pending litigation” exception — which can easily be abused by a board wishing to discuss a particular topic in closed session because it “might”

become the subject of a lawsuit — has been honed to require actual or imminent litigation to justify closed-session discussion.

Business and Professions Code section 6026.5 and the Bar’s Rule 6.55 govern closed sessions. However, the Bar’s open meeting rules concerning closed sessions are not “consistent with” and do not “conform to” the Bagley-Keene Act’s provisions concerning closed sessions, as required by section 6026.7. Under Government Code section 11126.3(c), the Bagley-Keene Act requires state agencies intending to meet in closed session to disclose, on the notice of the meeting published ten days in advance, the fact that it will meet in closed session and to state the specific statute justifying the closed session. For example, “to obtain legal advice in closed session concerning pending litigation, the notice must cite subdivision (e) of Section 11126 and your attorney must prepare a memorandum stating the specific reasons and legal authority for the closed session.”⁷ The Bar’s open meeting rules do not require closed sessions to be specifically noticed and justified on Bar meeting notices or agendas. Further, after a closed session concerning the appointment, employment, or dismissal of a public employee has concluded, Bagley-Keene requires the Board to convene in open session and report “any action taken, and any rollcall vote thereon, ... arising out of the closed session of the state body.” Government Code section 11126.3(f). Finally, the Bagley-Keene Act requires all closed sessions to be held during a regular or special meeting; they may not be held independently of a notice meeting of the board or committee. Government Code section 11128. The Bar’s rules contain none of these requirements.

6. Different Open Meeting Rules for “Board-Appointed Committees”: The Bagley-Keene Act (specifically section 11121) applies broadly to every “state body” and multimember subset thereof — including advisory boards, advisory commissions, advisory committees, advisory subcommittees, or similar entities — if (a) those entities are created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons; or (b) a member of a state body serves on such an entity in his or her official capacity as a representative of that state body and that is supported, in whole or in part, by funds provided by the state body, whether the multimember body is organized and operated by the state body or by a private corporation. No statute applicable to the State Bar defines the difference between the Board of Trustees and/or a “standing committee” and/or a “board-appointed committee.” The Bar’s open meeting rules in Title 6, Division 2, Chapter 1 (Rules 6.50-6.56) apply only to the Board of Trustees, standing Board committees, and advisory committees and commissions consisting of three or more Board members if created by formal action of the Board or a member of the Board. They do not apply to numerous “board-appointed committees.” Instead, in July 2011, the Board adopted an entirely different set of “open meeting rules” for “board-appointed committees” (Title 6, Division 2, Chapter 2, Rules 6.60-6.65) and has set forth no justification for a separate set of rules. This is inconsistent with the Bagley-Keene Act.

CPIIL acknowledges that a sliver of the Bar’s work — unlike the work of other occupational licensing boards — involves direct interaction with the executive and/or judicial branches that might warrant some variation from Bagley-Keene in terms of closed sessions. For example, the Commission on Judicial Nominees Evaluation (JNE) evaluates the qualifications of individuals nominated by the Governor for judgeships. Similarly, the Review Committee of the Commission on

⁷ *Id.* at 16.

Judicial Nominees Evaluation is charged with reviewing requests from those candidates that are seeking reconsideration of the JNE Commission rating of “not qualified.” CPIL would favor exemptions to Bagley-Keene for these two committees. Everything else the Board and its various committees do (both standing and Board-appointed) either (a) should be done in open session, or (b) falls within an existing exemption to Bagley-Keene, such that it may be discussed in closed session.

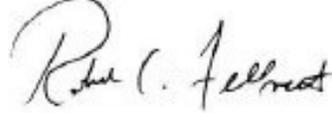
Every other occupational licensing board in the State of California has found a way to comply with the Bagley-Keene Open Meeting Act since its enactment in 1967. And members of most of those boards exercise quasi-judicial authority that the Board of Trustees does not exercise. For example, members of the Medical Board and the Pharmacy Board and the Board of Accountancy review and approve proposed disciplinary decisions drafted by administrative law judges, and make the final decision in individual disciplinary matters. The Bagley-Keene Act allows members to engage in disciplinary decisionmaking in closed session. The Board of Trustees exercises no quasi-judicial authority; it does not review and/or approve decisions of the State Bar Court’s Hearing Judge Panel or the Review Department. If the Bagley-Keene Act can accommodate the significantly more “judicial” authority exercised by executive branch agencies, why is it inappropriate for the Board of Trustees — which exercises no such judicial authority?

Finally, close association with the terms of Bagley-Keene allows for consistent guidance in its application from the longstanding body of law interpreting it — much of it solicitous to agency needs. A good attorney should want to include such a public judicial record for clarity and consistency. Since 1967, the Bagley-Keene Act has been flexibly expanded to accommodate new technology and changed circumstances; and it has been subject to fairly extensive judicial interpretation. There are clear advantages to fully signing onto the existing transparency statute for statewide agencies. The law has been amended to allow for all of the necessary exceptions to the open meeting requirement, such as closed sessions to discuss examinations or pending litigation; emergency meetings where necessary; and special meetings for certain items where there is a time constraint. And there is a body of law in place — one that has already considered the issues that will similarly impact the Board of Trustees and its committees.

Conclusion. Whatever the law was prior to January 1, 2012, it clearly changed as of January 1, 2012 with the passage and effective date of SB 163 (Evans) and its addition of section 6026.7 to the Business and Professions Code. The clear and unambiguous language of section 6026.7 reflects the Legislature’s intent that this Board conform its open meeting rules to the Bagley-Keene Act. Even the members of the 2011 Board of Governors agree. In the approved minutes of the Board’s June 17, 2011 meeting, a majority of the Board agreed to support SB 163 but directed its staff and lobbyists to “explore the possibility of the Legislature making any of the following amendments: “... **eliminate the amendment imposing Bagley-Keene Open Meeting Act on Board**” (emphasis added). The 2011 Board of Governors was well aware of the Legislature’s intent, and both the 2012 and 2013 Board of Trustees has thus far refused to initiate rulemaking proceedings to ensure that its open meeting rules are consistent with Bagley-Keene, and in fact has violated Bagley-Keene on numerous occasions (including its January 2012 adoption of a policy continuing the secret ballot election of its president, and its July 2012 secret ballot election of its new President).

CPIIL appreciates your consideration of these comments, and urges you to address these continuing significant inconsistencies between the Bar's open meeting rules and the Bagley-Keene Open Meeting Act.

Sincerely,

A handwritten signature in black ink that reads "Robert C. Fellmeth". The signature is written in a cursive style with a large initial "R".

Robert C. Fellmeth, Executive Director
Center for Public Interest Law
University of San Diego School of Law

Former State Bar Discipline Monitor

cc: Honorable Noreen Evans, Chair, Senate Judiciary Committee
Honorable Bob Wieckowski, Chair, Assembly Judiciary Committee